high cost, prime time, syndicated programming" as a condition of the video program marketplace requiring correction.

The market circumstances that the Commission identified as "propelling [it] to action" in 1970 have now been entirely reversed. From 1975 to 1990 the number of independent commercial stations in the United States more than tripled, reaching a total of 380.[83/] This growth reflected a new vitality for the UHF band. As UHF independent stations became serious competitors in market after market, the number of UHF stations nearly tripled also, reaching a total of 546.[84/]

Today, roughly 35 percent of all commercial television stations are independents. As a result, by 1990, 93.9 percent of television households received five or more television stations over the air, and more than half were able to receive ten or more stations. Television homes in the top 50 markets are almost always served by at least one, and often by several, independent stations.[85/]

83/ OPP Working Paper at 15.

84/ *Id*. at 15-16.

85/ *Id*. at 16.

The proliferation of independent stations, combined with the non-network time traditionally available on network-affiliated stations, has resulted in an exponential growth in the amount or air time open to all syndicated programming. The contribution of the PTAR rule has been modest. In 1980, ten years into the rule's existence, annual revenues for the syndication market totalled only $50 million. During the 1980's, as the number of independent stations mushroomed, a corresponding growth occurred in syndication revenues, reaching $1.2 billion annually by 1990.[86/]

The growth in first-run syndication that the Commission hoped for in enacting PTAR has been realized many times over, but the rule -- and in particular its off-network proscription -- accounts for only a small fraction of that growth. Certainly, the off-network proscription is entirely unnecessary today to sustaining a vibrant first-run syndication market. The impact that the proscription has on that market is merely to preordain a particular distribution of first-run and off-network programs during "access" periods -- i.e., first-run on

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86/ "Cosby Sidesteps Networks With His Biggest TV Deal," New York Times, October 28, 1991, p. D8.

network-affiliated stations and off-network on independent stations.

If all or most of the first-run syndicated programming on television occurred during affiliates' access periods, there would be a strong basis for suspecting that the very existence of first-run syndicated programming is entirely a creature of government regulation. The theory would be that off-network programming is so uniformly preferable to first-run syndicated programming that, absent government regulation, it would drive first-run programming out of the market.

The fact, however, is that both affiliated and independent stations broadcast hours and hours of first-run syndicated programming in circumstances where they are free to choose off-network alternatives. Since off-network programming has come nowhere close to pushing first-run programming off the schedules of independents or off the non-network, non-access schedules of affiliates, there is no reason to suppose that a recision of the off-network proscription would result in even a slight reduction in the quantity of first-run syndicated programming in the marketplace.

The much more likely result of permitting affiliates to broadcast off-network as well as first-run programming in their access periods would be a redistribution, to some unpredictable extent, of off-network and first-run programming between affiliates and independent stations, between access scheduling and scheduling in other dayparts. The overall composition of the menu of choices available to viewers is unlikely to change significantly.

It is also important to stress that while the Commission's hopes for expansion in the first-run syndication market have been realized quantitatively, the qualitative dimension of that hope -- that a proliferation of "independent" producers would bring something new to the television programming mix -- certainly has not been realized. Of the ten most successful (i.e., most-watched) first-run syndicated programs last season, all but two were either produced or distributed, or both produced and distributed, by a regular supplier of network programming -- i.e., either a major Hollywood studio or a longstanding producer of network game shows.87/ This familiar roster of game shows and "reality magazines" has made a remarkably

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87/ For a list of these programs and the firms that produce and syndicate them, See Exhibit III, attached.

small contribution to the diversification of television program forms.[88/]

That is not to say that these first-run syndicated programs are "bad" programs in any sense. Our only point is that the content of commercial television programs is essentially a function of public tastes and the money and talent available to accommodate those tastes. First-run syndicated programming is distributed less efficiently, draws a smaller base of advertiser support, and therefore must be less expensive than network programming. That is

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88/ In 1974, the Commission, despite its earlier professed lack of concern with the types of programs that would replace network offerings, amended the Prime Time Access Rule in reaction to the proliferation of game shows that the rule had spawned. The amendments carved out exceptions to the rule for various types of network and off-network programs -- exceptions that reflected the Commission's awareness that, in many cases, network and off-network programming was preferable to non-network alternatives. The Court of Appeals barred the Commission from implementing its 1974 amendments on procedural grounds and, without reaching the merits, suggested that the Commission reconsider whether liberalizing the rule was in the public interest. <u>National Ass'n of Independent Television Producers and Distributors v. FCC</u>, 502 F. 2d 249 (2d Cir. 1974). On reconsideration, the Commission decided that the full hour of access time should be retained, with the present exceptions for certain news, sports and children's programs. <u>Consideration of the Operation of, and Possible Changes in the Prime Time Access Rule, Section 73.658(k) of the Commission's Rules</u>, 50 F.C.C.2d 829 (1975).

the only difference. The idea that the presence of a network in the program-creation process somehow diminishes the creative range of this process was naive from the start, and has been proven by experience to be absolutely false.

In 1980, the Commission's Network Inquiry Special Staff recommended that the prime time access rule be repealed. The Staff found that the rule did not and could not achieve its intended effects of increasing the amount of programming produced and enhancing competition among program suppliers and between program suppliers and networks.[89/] The Staff also found that the Commission's goal of encouraging the replacement of network programming with non-network programs

> "amounts simply to the assertion that certain programs are objectionable solely because of their source. Such a position is wholly at odds with elementary first Amendment principles."[90/]

In recommending repeal of the rule, the Staff emphasized that far from freeing affiliate choices from the domination of an overbearing network, the rule had had the

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89/ Network Inquiry Final Report at 510-511.

90/ Id. at 511.

effect of sharply narrowing affiliate choices. The Staff thus reached the conclusion that the Commission itself had come to in 1963 when it initially rejected the rule.

Again, we do not here advocate the rule's repeal. We accept the three-hour network prime time schedule as an established part of the network-affiliate relationship. But we believe that the Commission can go a long way to restoring much of the affiliate choice that the rule removed, and avoid serious harm to broadcast networks in the process, by eliminating that portion of the rule that bars off-network programming from the access periods of top 50 market affiliates.

IV. A POLICY OF RETRANSMISSION CONSENT SHOULD BE ADOPTED AND APPLIED TO CABLE SYSTEM RETRANSMISSION OF LOCAL SIGNALS.

Last year, in a report to Congress, the Commission warned that the current rules governing cable carriage of broadcast signals created a competitive imbalance which threatened to "undermine the viability of local television." Cable Television Service, 5 FCC Rcd 4962, 5042 (1990). They did so, the Commission found, by allowing cable operators to use broadcast programming at a fraction of the cost paid by the broadcasters themselves -- in effect, forcing broadcasters to subsidize the programming of their direct competitors. Id. Accordingly, the Commission urged Congress "to redress the competitive imbalance between cable systems and local broadcasters by giving broadcasters the right to control the use of their signals" through a system of retransmission consent. Id.

The findings and predictions of the Commission staff in the OPP Working Paper illustrate in dramatic fashion the urgency of the Commission's 1990 recommendations. As discussed above, the report documents the rapid growth of cable's share of audiences and advertising revenues, at the expense of broadcaster shares. The report projects a continued rise in cable market share and decline in the shares of local and network broadcasters.

We urge the Commission to forcefully reaffirm its recommendations of a year ago -- that to ensure the continued viability of over-the-air broadcasting, and as a matter of basic fairness, broadcast stations should regain the right to negotiate the terms of retransmission of their signals by their competitors.[91/] While the television networks would not be the direct beneficiaries of such a principle, we have already noted that the financial strength of local affiliates, including those owned by network companies, is critical to the success of the free over-the-air national/local broadcasting system.

Even though this right to negotiate the terms of carriage would not necessarily translate into a right to receive cash payment, i.e., a second "revenue stream," it would in some cases. In other cases, "compensation" could

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91/ The principle of retransmission consent is, of course, not a radical communications policy notion. Section 325 of the Communications Act has since 1927 provided that no "broadcasting station [shall] rebroadcast the program or any part thereof of another broadcasting station without the express authority of the originating station." (emphasis added) Pub. L. No. 69-632, 44 Stat. 1162, 1172 (1927).

take the form of channel positioning arrangements or other non-cash consideration. Whatever form the negotiated arrangement might take, such a free-market system would go a long way toward righting the competitive balance between broadcast and non-broadcast media. It would do this by eliminating the government-imposed subsidy under which cable systems freely obtain local station signals and use them to build their subscriber base. In turn, this subsidy has enhanced the ability of the cable industry to sell local and national advertising and to compete in the program supply marketplace in direct competition with broadcast stations and networks.[92/]

Local broadcast stations need to have the ability to protect the value inherent in their broadcast service to their communities from such unfair and uncompensated exploitation by their competitors. As the Commission has recognized, it is not just the individual copyrightable

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92/ A recent Roper poll of 1,200 cable subscribers found that 43 percent of those polled would cancel their cable subscriptions if their local cable system no longer carried network-affiliated stations and 23 percent said they would consider doing so. America's Watching: Public Attitudes Toward Television 8-9 (1991). It is thus undeniable that a significant portion of the current revenue received by cable systems is attributable to the carriage of local broadcast signals.

components of their schedules which are at issue. It is also "the added value local broadcasters provide when they construct successful programming schedules mixing local and national programming," Cable Television Service, 5 FCC Rcd at 5042, as well as the station's promotional activities, community service, and good will.

We recognize that, depending on local market considerations, some broadcasters may be more interested in reinstitution of "must-carry" rules, which would ensure carriage of their signals on local cable systems, than they are in the ability to negotiate the terms of such carriage.[93/] That is why CBS believes that the balanced approach to the cable/broadcast relationship embodied in

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93/ We also recognize that the Hollywood program production interests (even those with broadcast interests as well) argue that repeal of the copyright compulsory license is the preferred "solution" to the overall problem of the dysfunctional cable/broadcast competitive relationship. Broadcasting, October 28, 1991 at p. 52. We believe that the issue of the compulsory copyright license is separate and distinct from, and should not be confused with, the communications policy issue of retransmission consent. In any case, CBS believes that regardless of whether the cable compulsory license is needed anymore to facilitate transactions in today's program supply marketplace, its repeal would simply not address the disadvantage broadcast stations face in competing in today's multichannel environment.

legislation currently under active consideration in the Congress (Section 12) is especially promising.[94/]

Under the approach of S.12, a local television station would have the option every three years to choose whether to operate under a "must-carry" regime or a "retransmission consent" regime. Such a legislative and resulting regulatory scheme would protect the ability of smaller, weaker stations to reach their audiences in the communities they are licensed to serve, while at the same time allowing other stations the option of negotiating for the fair value that retransmission of their signals represents to the cable system.

This legislation embodies a creative solution to a problem which is extremely important to the health of the network/affiliate system and to local broadcasting in general. The Commission should again urge Congressional enactment of a retransmission consent scheme.

94/ S.12, 102d Cong., 1st Sess (1991).

CONCLUSION

We do not here seek special privileges, protections, or benefits for networks in particular or for broadcasters generally. What we seek is fairness -- the removal of outmoded and unnecessary restraints which handicap broadcasters in our efforts to compete in an increasingly competitive television marketplace. A level playing field, free of needless regulatory shackles, is essential if network television is to continue providing the American public, free of charge, with top-quality and universally available news, sports, public affairs, and entertainment programming. Retention of these restraints, on the other hand, can only imperil the continued vitality of network television and over-the-air broadcasting.

Respectfully submitted,

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EXHIBIT I

TOP 50 MARKETS
EARLY FRINGE AND PRIME ACCESS
AVERAGE RATINGS AND HUTS BY HOUR
CBS, NBC, ABC AFFILIATES

		AVERAGE WEIGHTED RATING		
TIME*	HUT	CBS	NBC	ABC
4:00-5:00PM	34	5.5	5.2	8.0
5:00-6:00PM	40	7.2	6.5	8.7
6:00-7:00PM	48	8.0	7.9	10.3
7:00-8:00PM	52	8.8	8.7	10.8

*Time Zone Adjusted

SOURCE: A.C. Nielsen, May 1991

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EXHIBIT II

OFF-NETWORK PROGRAMS
PRIME ACCESS VS. EARLY FRINGE
MARKETS 51+

PROGRAM	PRIME ACCESS NUMBER OF OCCURRENCES	PRIME ACCESS AVERAGE UNWEIGHTED RATING	EARLY FRINGE NUMBER OF OCCURRENCES	EARLY FRINGE AVERAGE UNWEIGHTED RATING
MASH	7	10.6	7	3.6
GOLDEN GIRLS	12	10.1	18	6.8
WHO'S THE BOSS	10	10.0	21	5.5
COSBY	36	9.7	19	7.2
CHEERS	10	9.1	13	8.6
NIGHT COURT	9	7.3	9	6.8
ALF	1	6.7	14	2.8
AMEN	1	4.7	--	--
PERFECT STRANGERS	1	4.7	10	4.4
GROWING PAINS	4	4.4	26	4.2
FAMILY TIES	1	3.0	7	2.5

SOURCE: **A.C. NIELSEN, May 1991**
(59 Equal Facilities Markets/CBS, NBC, ABC)

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PROGRAM TITLES
TOP 50 MARKETS
M-F, 7-8 P.M./6-7 P.M.

Program Title	Producer	Syndicator
Hard Copy	Paramount	Paramount Domestic TV
Entertainment Tonight	Paramount (in assn. w/Cox Broadcasting, Telerep)	Paramount Domestic TV
Family Feud	Mark Goodson	LBS Communications
Jeopardy	Merv Griffin Enterprises (Owned by Sony Entertainment (Columbia))	King World Productions
Wheel of Fortune	Merv Griffin Enterprises (Owned by Sony Entertainment (Columbia))	King World Productions
Inside Edition	King World Productions	King World Productions
Instant Recall	King World Productions	King World Productions
$100,000 Pyramid	Bob Stewart, Sande Stewart	Orbis Communications
Love Connection	Eric Lieber	Warner Bros. Domestic TV Distribution
People's Court	Ralph Edwards/Stu Billet Productions	Warner Bros. Domestic TV Distribution
Cheers	Charles/Burrows/Charles Productions	Paramount Domestic TV
Mama's Family	Joe Hamilton Productions	Warner Bros. Domestic TV Distribution

EXHIBIT III

October 28, 1991